Kluwer Copyright Blog

No more downloading from unlawful sources?

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"This would mean that the ruling will not leave end-users substantially worse-off, despite the qualification of their acts as infringing. However, that is a difficult argument to make."

In its judgment of 10 April 2014 in Case C-435/12 ACI Adam BV and Others the Court of Justice of the European Union (**CJEU**) ruled that the private copying limitation, when interpreted in light of the three-step test, only allows Member States to exempt reproductions made for private use from lawful sources from authorization. The Court essentially followed the Opinion of AG Villalón (see here).

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Facts, dispute and questions referred

ACI Adam and other companies are Dutch manufacturers and importers of blank media (e.g. CDs, CD-Rs) used for the reproduction of works by consumers. Those media are designated for payment of the private copying levy, imposed primarily on the aforementioned companies, which can then pass it on to consumers in the retail price.

In the Netherlands, *Stichting de Thuiskopie* is the organization responsible for the collection of levies from debtors and its distribution to rights holders. The level of remuneration and levy targets are decided by a foundation called *SONT*, which board

is composed of representatives of rights holders (namely *Stichting de Thuiskopie*), representatives of entities liable for payment (manufacturers and importers) and an independent chairman appointed by the Minister of Justice.

Art. 16C(1) and (2) of the Dutch Copyright Act implements the private copying limitation and imposes liability for payment on manufacturers and importers of reproduction media. ACI Adam and others argued that *Stichting de Thuiskopie* and *SONT* have determined and collected the levy incorrectly, as they take into account copies from unlawful sources.

The ensuing litigation made its way to the Supreme Court of the Netherlands (the *Hoge Raad*), which stayed proceedings and referred 3 questions to the CJEU for preliminary ruling. Our focus is on questions (1) and (2), examined jointly by the Court in §§20-58 and summarized as follows:

- Does the Copyright Directive's private copying limitation, when taking into account the three-step test, prevent national implementations of the limitations (such as the Dutch Copyright Act) that do not distinguish between situations where a private copy is made from a lawful source from those where the source is unlawful? Is the answer to that question affected by considerations on the availability of technical protection measures (**TPMs**) to restrict unauthorized acts? [1]

Judgment

Interpretation of the private copying limitation requires articulation of several provisions in the Copyright Directive:

- art. 2, defining a general right of reproduction;
- art. 5(2)(b), containing the limitation in question;
- art. 5(5), setting out the three-step test;
- art. 6(1), (3) and (4) clarifying certain interfaces between limitations and the application of TPMs; and
- recitals 22, 31, 32, 35, 38 and 44, which supplement the interpretation of the above articles.

When interpreting these provisions and especially the three-step test, the Court emphasizes from the outset a key point in §27: while nothing in the Directive mentions the possibility of Member States implementing limitations by extending their scope, recital 44 admits the possibility of reducing that scope in connection with "certain new uses" of copyrighted content.

The directive is silent on the nature (lawful or unlawful) of the source from which reproductions are made. However, CJEU case-law clarifies that exceptions/limitations are to be interpreted strictly. Therefore, and in light of the context and objectives of the limitation, the Court states that art. 5(2)(b) cannot impose on rights holders that they tolerate "infringements […] which may accompany the making of private copies" (§§31-37).

That line of interpretation is weaved into the court's analysis of the three-step test on

art. 5(5). Notably, the judgment states that national laws allowing reproductions from unlawful sources may infringe the second and third conditions of the test. How?

As a reminder, the second step requires that limitations shall only be applied in special cases “which do not conflict with a normal exploitation of the work or other subject-matter”.

- For the Court, allowing reproductions from unlawful sources encourages piracy, which will “inevitably” reduce revenues from lawful sources and conflict with the normal exploitation of works. Put differently, the Court believes there is a “substitution effect” between reproductions made from lawful sources and those made from unlawful sources. That assertion, which seems essential to the ruling, is not further explained.

In addition, the third step requires that limitations shall not “not unreasonably prejudice the legitimate interests of the rightholder”.

- Consideration of unlawful sources would force rights holders to tolerate infringements accompanying the making of private copies, thereby unreasonably prejudicing their legitimate interests. There is, it can be said, some circularity to this argument. It seems based primarily on the principle of strict interpretation and ignores the traditional role of the remuneration element (here: fair compensation) in satisfying the third step condition.

In light of the above – in essence: principle of strict interpretation + potential substitution effects –, the Court concludes that art. 5(2)(b) cannot cover private copies made from unlawful sources.

In what concerns the impact of the availability (or non-availability) of TPMs for determining the relevance of the source of reproductions, the Court returns to its ruling in VG Wort (on which, see here). In doing so, it states that TPMs relevant for private copying are those aimed at restricting unauthorized reproductions, therefore ensuring the proper application of the limitation.

Although TPMs are applied by rights holders, Member States implement the limitation and authorize private copying (by law). Hence, Member States are responsible for ensuring the proper application of the limitation, including restricting unauthorized acts.

Following that logic, national laws that do not exclude reproductions from unlawful sources cannot ensure the proper application of the limitation. Such conclusion, the Court posits, is independent of, and remains unaffected by, the non-availability of effective TPMs to prevent unauthorized reproductions.

The Court further notes that, when interpreting the condition of fair compensation in light of previous case-law (*Padawan*, *Stichting de Thuiskopie*) and recital 31, a levy system which does not distinguish lawful from unlawful sources, fails to respect the fair balance between the rights and interests of authors and users that the Copyright Directive intends to safeguard.

That is because under such a system the “harm” on the basis of which fair compensation is calculated, includes an “an additional, non-negligible cost” for reproductions made from unlawful sources. That cost is ultimately passed on to consumers purchasing levied devices/media. As a result, those consumers are “indirectly penalised”. Why? Because they will contribute towards compensating for harm caused by reproductions not allowed under the directive. (§56).

In sum, the joint reading of the directive’s private copying limitation and three-step test provisions led the Court to conclude that national copyright laws which do not distinguish between lawful and unlawful sources of the reproduction act are not in conformity with EU law, irrespective of the availability of effective TPMs.

Reactions and Impact

The Court’s ruling will affect not only the way in which private copying levies are calculated – as these can no longer take into consideration reproductions made from unlawful sources – , but will also mean that a significant number of reproduction acts from end-users (such as downloads of entertainment content from unlicensed Internet sites) are now clearly infringing.

In its reaction to the decision, the Dutch government issued a communication (in the form of a letter) noting that it will not change the Copyright Act, as the wording of art. 16 can be interpreted in conformity with the CJEU’s ruling. Accordingly, the decision “will immediately come into effect”. However, the communication states that the primary means to safeguard intellectual property rights is private enforcement. It is noted that enforcement against end-users is not only difficult from the technical standpoint, but also raises privacy concerns. Therefore, the Dutch Government does not expect individual users who download from unlawful sources to face legal action.

In connection to this, the Dutch anti-piracy organization *Stichting Brein* issued a press release, stating that it will not change its enforcement policy to include actions against end-users, but will rather continue to focus its efforts on illegal traders, such as those individuals and companies making a business out of providing unlawful access to works. Because providing access to unlawful copies of works is now also prohibited, *Stichting Brein* expects its enforcement efforts against websites of the abovementioned type to be facilitated.

The above would mean that the ruling will not leave end-users substantially worse-off, despite the qualification of their acts as infringing. However, that is a difficult argument to make. First, because rights holders can now bring additional infringement actions, even if at the moment they do not intend to do so. Second, because the CJEU’s failure to clarify what constitutes an unlawful source does not provide legal certainty regarding many online acts where works are made available without clear indication by rights holders of which acts are authorized (this can also affect the calculation of levies).

In what concerns determination of the levy, the CJEU ruling implies a change in the calculation method, which must now exclude reproductions from unlawful sources.

Despite that and the judgment's "direct effect", the method of calculation will remain unchanged until SONT develops a new and suitable approach, which is expected to occur before this summer, as referred to in the aforementioned governmental communication.

Currently, SONT benchmarks levy amounts in different member states, whether or not they include reproductions from lawful sources, adjusted for each country's per capita GDP numbers. That approach is in theory "harmonizing friendly" and therefore consistent with the Copyright Directive's aims. It is known that certain member states which explicitly exclude reproductions from unlawful sources have higher levy rates than the Netherlands (e.g. Germany and France). Consequently, it does not necessarily follow from the judgment that levy amounts will be reduced in the Netherlands. What seems inevitable, however, is that even if the overall levy amounts are reduced, that reduction will only benefit certain device/media manufactures or importers, namely those which market products typically used for downloads from unlawful sources (e.g. memory devices). If the benchmarking logic is kept, other devices/media used for lawful reproductions will likely see their share of the pie rise (e.g. set-top-boxes).

Conclusion

In light of the above, the ACI ADAM ruling might have a different impact than expected on the calculation of levy amounts. If levies do not drop significantly, it is difficult to argue that consumers are left better off. Similarly, unless the possibility to control online uses increases dramatically in order to allow rights holders to exploit uses now covered by the limitation (or leverage this interpretation against illegal websites), the ruling also does not represent a significant improvement. Finally, while some manufacturers/importers will pay lower levies, it is still unclear if most of them will actually benefit, being likely that some will end up paying the same or even more than before.

As noted by at least one commentator, the ACI ADAM decision seems to leave Member States with a narrower margin of discretion for national implementation of limitations (differently, for example, from what is suggested by Professors Hugenholtz and Senftleben). In fact, the Court favors the interpretation that national laws' discretion can be used solely to restrict the scope of the limitation for "certain new uses of copyright works and other subject-matter" (§27, relying on recital 44 of the directive).

However, this decision does not provide clear guidance on the evolution of levies: will they be phased-out in the digital environment following such a strict interpretation? Will levy targets move online and include cloud services (see here)? Or will the decision and its consequences for end-users raise the need for the legalization of digital content sharing acts (see here)?

Stay tuned.

JPQ & AdL

A PDF-version of the article can be downloaded here.

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[1] Question 3 refers to whether or not the Enforcement Directive applies to proceedings "in which those liable for payment of the fair compensation bring an action before the referring court for a ruling against the body responsible for collecting that remuneration and distributing it to copyright holders, which defends that action". The Court answers in the negative. Readers are directed to §§7-8 and 59-65.

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